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ORIGINAL

87-7101

NO.A-816

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANTHONY JAMES MANN,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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QUESTIONS PRESENTED

I.

Whether the consideration by the jury of certain prejudical evidence, construed by the State appellate Court to be harmless, undermined the reliability of the death sentence of Petitioner especially considering the impact of prosecutorial misconduct and the finding by the jury of only one, but constitutionally invalid aggravating circumstance?

II.

Whether the Court erred in refusing to instruct the jury on the elements and punishment for the offense of manslaughter in the first degree ?

III.

Whether the Court erred by instructing the jury during the sentencing phase to consider an invalid aggravating circumstance which was the only aggravating circumstance found and relied upon by the jury in sentencing the Petitioner to death.

PARTIES TO THE PROCEEDINGS BELOW

In the Court of Appeals of Oklahoma, Case No. F-84-217, the Appellant was Anthony James Mann (Petitioner in this action), and the Appellee was The State of Oklahoma (Respondent in this action).

In the District Court of Grady County, Oklahoma, Case No. CRF-83-45, the Plaintiff was The State of Oklahoma and the Defendant was Anthony James Mann.

OPINION BELOW

The opinion of the Court of Criminal Appeals is published as Mann v. State, 749 P.2d 1151 (Okl.Cr. 1988). The opinion is reproduced in the Appendix.

There is no formal trial court opinion.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. Section 1257 (3). The opinion of the Court of Criminal Appeals was entered on January 5, 1988. The Court of Criminal Appeals denied a timely petition for rehearing on Feburary 29, 1988. On April 19, 1988, Justice Byron R. White entered an order extending the time for petitioning for a writ of certiorari to and including May 29, 1988.

STATEMENT OF CASE

Anthony James Mann (hereinafter referred to as "Petitioner") was convicted in Grady County District Court, Case No. CRF-83-45 of First Degree Murder and sentenced to death. On January 5, 1988, the Court of Criminal Appeals for the State of Oklahoma affirmed the judgment and sentence.

The evidence at trial showed that on February 18, 1983, the body of Charles Keene was discovered by authorities in the Washita River under the State Highway #62 bridge, located about one and one-half miles east of the City of Chickasha, in Grady County, Oklahoma. An autopsy examination revealed that the body had various bruises around the forehead and facial area, back and forearms. There were gunshot wounds into the left chest from the left side and into the back of the head. The throat was cut and there were two cuts extending down from the lower part of the chest through the abdominal wall and on the right side of the back of the head. The right leg, at the tibia, was broken. Charles Keene had died as a result of gunshot wounds to the head and the chest. There was not a significant amount of bleeding

from the wounds, indicating that he may have been shot before the stab wounds were inflicted.

Bobby Glass, Richard Jones, Wayne Thompson, and the Petitioner, Anthony James Mann(referred to herein as Petitioner and Defendant Mann) were charged with first degree murder of Charles Keene on January 23, 1983. They were tried separately, and at the fourth trial, that of the Petitioner, Anthony James Mann, the State relied heavily on the testimony of Wayne Thompson, a convicted accomplice, to establish the events resulting in this homicide of Charles Keene. Wayne Thompson was fifteen years of age at the time of the trial, and is the half-brother of the Petitioner, Anthony James Mann. The testimony indicated that the victim, Charles Keene, was the estranged husband of Vicki Keene, the sister of the Petitioner and Wayne Thompson. Vicki Keene and Charles Keene had been cohabitating in a trailer house near Amber, Oklahoma, when a domestic dispute arose leading to the intervention by the Petitioner and his co-defendants. There was some testimony indicating that Charles Keene had pulled a butcher knife on the Petitioner during the afternoon hours of January 22, 1983. During the evening hours of January 22, 1983, the Petitioner and his co-defendants began a spree of drinking, which apparently included the use of Valiums and marijuana, which lasted for six or seven hours and resulted in the Petitioner and Richard Jones being extremely intoxicated. At about midnight the defendants left the Stork Club, a local bar in Chickasha, and proceeded north to Amber and Vicki Keene's trailer house to remove Charles Keene, and according to witness Wayne Thompson "set him out on the highway" and away from Vicki Keene. The testimony indicated that Charles Keene went with the defendants voluntarily in an automobile driven by the Petitioner and owned by Danny Mann, the Petitioner's brother. They proceeded to a rural bridge near the residence of "Opossum" Brown where the Petitioner stopped the vehicle, and while still sipping from a bottle of whiskey, announced to Charles Keene that they were going to "whip your butt before we let you out." According to witness Thompson, Charles Keene, who was seated in the back seat of the vehicle,

struck him with his fist and struck the Petitioner with the car door, knocking him off the bridge. Charles Keene then ran to the residence of "Opossum" Brown for help. A struggle ensued on the front yard area, resulting in a shot being fired from a pistol being carried by Wayne Thompson, apparently without injury to anyone. Charles Keene was rendered unconscious in this struggle and was placed in the trunk of the vehicle. The defendants then drove to an area 1.5 miles east of Chickasha, where, according to witness Thompson, he pulled the pistol on the Petitioner and forced him to drive the vehicle to the riverside, under Highway #62 bridge at the Washita River. The Petitioner apparently ran into a gate post en route from the highway to the riverside. According to the State's witness Thompson, neither the Petitioner nor Richard Jones actively participated in what subsequently occurred at that river bank in the early morning hours of January 23, 1983.

Charles Keene was released from the truck of the vehicle and began struggling with co-defendant, Bobby Glass, apparently pinning Glass to the ground while striking him repeatedly with his fists in the face. Wayne Thompson pulled the pistol he was carrying out and shot Charles Keene, who then rolled off of Bobby Glass. Bobby Glass then got up and grapped the weapon from Wayne Thompson and shot the victim Charles Keene. Glass and Thompson used a block and chain from the trunk of the vehicle and tied the block on the body of Charles Keene. According to the witness Thompson, he then took a knife and inflicted the laceration wounds on the body of Charles Keene "in hopes that the fish would eat the body if they tasted the blood a little better". The body of Charles Keene was then pulled into the river by Wayne Thompson where it was left apparently until the discovery by the Grady County Sheriff's Department approximately one month later.

The State called witnesses, Malcolm "Opossum" Brown and his wife, Lucille Brown, who testified regarding the struggle that occurred in their front yard, but they were unable to identify any of the participants.

Benny McCarthy testified regarding certain statements by the Petitioner which were made in the early morning hours of January 23, 1983, at the home of the Petitioner's mother about the defendants checking on a body to see if it was floating and to get rid of the gun, and that he accompanied Bobby Glass and Vicki Keene to the Washita River bank east of Chickasha to make sure that the body was still hidden.

Vicki Keene testified for the State that Charles Keene was her former husband; that they were divorced, but he was residing with her and their two children until the time of his death. She testified about the dispute which arose over the use of her car and the altercation between the Petitioner and Danny Mann and Charles Keene during the afternoon hours of January 22, 1983, which resulted in Charles Keene pulling a butcher knife on the Petitioner and forcing him to leave the trailer house. She further testified that she later that day purchased the bullets for the gun that was subsequently used to kill Charles Keene, and that the next morning the Petitioner give her a cigarette lighter and a knife that she testified belonged to the victim, Charles Keene.

The bulk of the remainder of the State's witnesses were law enforcement personnel who testified about their investigation, and the exhibits of physical and scientific evidence that were presented to the jury.

The Petitioner, Anthony James Mann, did not testify. No evidence was presented on his behalf during the first stage of the trial proceedings, and the Petitioner was found guilty of the offense of murder in the first degree death. During the second stage of the proceeding, the Petitioner called witnesses who testified he was not violent and could be rehabilitated. The jury sentenced the petitioner to death and the Court of Criminal Appeals affirmed the judgment and sentence.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

THE CONSIDERATION BY THE JURY DURING THE SENTENCING PHASE OF HIGHLY PREJUDICIAL EVIDENCE TOGETHER WITH INFLAMMATORY AND PREJUDICIAL COMMENTS OF THE PROSECUTOR AT THE SENTENCING PHASE SO UNDERMINES THE RELIABILITY OF THE DEATH SENTENCING PROCESS THAT AN UNACCEPTABLE RISK EXISTS THAT THE JURY SENTENCED DEFENDANT MANN TO DEATH IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE 8TH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER "GHASTLY, COLOR" PHOTOGRAPHS WHICH UNDULY PREJUDICED THE DEFENDANT, MANN'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

This Defendant, Mann, was the last of the four defendants convicted of the offense of first degree murger for the death of Charles Keene. Defendant, Thompson, was convicted of first degree murder and his case was affirmed in Thompson v. State, 724 P.2d 780 (Okla. 1987) and the case is now pending before this Court in Case No. 86-6169 on the issue of the improper admission of inflammatory evidence, as urged in this case, and the constitutionality of sentencing a juvenile to death. Defendant, Glass, was convicted of first degree murder for the death of Charles Keene and was killed in prison prior to the affirmance of his sentence of death. Defendant, Jones, was convicted of first degree murder and sentenced to death although his case was reversed on appeal. See Jones v. State, 738 P.2d 525 (Okl. Cr. 1987). Jones was acquitted on retrial presumably without the use of the inflammatory evidence and prejudicial comments.

In this case, the trial court admitted evidence characterized by the Oklahoma Court of Criminal Appeals as "gruesome", "ghastly", and of little probative value, Thompson, supra. at 782-783.

The Oklahoma Court of Criminal Appeals found in the Jones, supra., at 528 that two (2) of the photographs should not have been admitted and stated:

> "Our examination of these two color photographs leads us to conclude that their minimal probative force, in light of their cumulative nature, was substantially outweighed by the danger of unfair prejudice." 12 O.S. 1981, Section 2403, see Tobler v. State, 688 P.2d 350, 355-356 (Okl. Cr. 1984)...these two photographs added virtually nothing to the state's submission of

proof, and served no other purpose than to inflame the jury. See Thompson v. State, 724 P.2d 780, 782 (Okla. Cr. 1986). The trial court's admission of these two photographs was error."

The Oklahoma Court of Criminal Appeals found in Defendant, Mann's, case,:

> "The same pictures were offered in evidence in appellant brother's case. As we found in that case, two of the photo exhibits, numbers 10 and 11, should not have been admitted due to their gruesome nature. Thompson, 724 P.2d 782, 783 (Okla. Cr. 1986). Although these photos were taken at the same time and the subject is essentially the same as in the video tape, due to the sharper focus and closer range, the result is too inordinately grisly pictures of the body. The pictures show the mud, blood and slime from the river, the slit in the victim's throat and the entry wounds of the bullets in the chest and head. However, the case against appellant was sufficient and we do not find this evidence affected the jury's verdict. Thompson v. State, 724 P.2d at 783."

The appellate court, in reviewing death penalty cases, shirks the responsibility of assuring the defendant received a fair and full consideration when the court finds error to be harmless and affirms the guilt of the defendant but makes no specific inquiry of the effect of the error in the sentencing phase.

Under Oklahoma law, rules governing admissability of evidence in the sentencing phase are the same as the guilt phase, 12 O.S. Supp. 1987, Sec.2103. The trial court attempted to apply the required balancing test of probative v. prejudicial, but only without success as indicated in the Oklahoma Court of Criminal Appeals' Opinion in Jones v. State, supra. But, as in the Thompson case, as previously argued to this court, this balancing test must be more carefully scrutinized and applied when such inflammatory, prejudicial evidence is considered by the jury during the sentencing phase, especially where the jury finds but one aggravating circumstance, the fact that the murder was commited in a "especially heinous, atrocious and cruel manner." Notwithstanding a conspicuous lack of evidence that Mann had any direct involvement in the actual killing, to allow speculation that the jury might still have decided to sentence Defendant, Mann to death, without the prejudicial and inflammatory evidence is violative of tenets espoused by this court in many cases.

> "Guarding against the arbitrary and discriminatory imposition of the death penalty must not become a guessing game played by a reviewing court in which it tries to discern whether the improper non-statutory aggravating factor exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more. Rational appellate review of capital sentencing decisions ...requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities...only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error."

Profitt v. Wainright, 685 F.2d 1227, 1269 (11th Cir. 1982) Cert. denied 464 U.S. 1002 (1983) "Rejecting state's harmless error argument, when court considered improper non-statutory aggravating circumstances." Quoting Henry v. Wainright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds _____ U.S. _____, 73 L.Ed.2d 1326 (1982). A jury's roll in assessing the fairness of the most severe penalties requires full, fair and careful consideration of all mitigating circumstances without passion or prejudice. The "'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" Zant v. Stephens, 462 U.S. at 888 (Quoting Lockett v. Ohio, 438 U.S. at 604, "Plurality opinion of Berger C.J." Lockett, supra., reflect a belief that punishment should be directly related to personal culpability of a criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reason moral response to defendant's background, character and crime rather than mere sympathy or emotion. California v. Brown, 107 S.Ct. at 841.

The trial court's error in allowing the consideration of the gruesome photographs together with the overzealous prosecution resulted in a death sentence which if allowed to stand will be imposed with a constitutionally unacceptable risk that the jury imposed the death penalty in an arbitrary and capricious manner. Cf.Booth v. Maryland, 107 S.Ct. 2529 at 2533.

B. THE ERROR OF THE ADMISSION OF THE PHOTOGRAPHS AND CONSIDERATION OF THIS INFLAMMATORY EVIDENCE BY THE JURY WAS FURTHER COMPOUNDED BY PROSECUTORIAL MISCONDUCT

The recognized standards governing conduct of the prosecutor, requires the prosecutor to refrain from argument calculated to inflame the passions or prejudice of the jury or from injecting issues broader than the guilt or innocence of the accused. ABA Standards adopted by the Oklahoma Court of Criminal Appeals in Ray v. State, 510 P.2d 1395 (Okl. Cr. 1973). The prosecutor in this case began closing argument in the guilt and innocent phase by reminding the jury of his opening statement wherein he promised he would bring the jury the next best thing to the decedent, Charles Keene, that being a videotape. He improperly added that the photos show "what is left of the person that was once Charles Keene". He then proceeded to call Defendant, Mann, a corpse robber. Cf. Sommers v. State, 541 P.2d 258 (Okl. Cr. 1975). In the final portion of the prosecutor's argument during the guilt or innocent phase he repeated the statement of the decedent's concern for his children, "that's the last thing on his [decedent's] mind."

After the finding of guilt, the prosecutor had but one objective, to go four for four. The prosecutor had already convicted three co-defendants of Mann and obtained three death penalties for the same crime. Why change a game plan that had worked previously as he knew the judge would admit the photographs, the video tape, the judge would allow incompetent hearsay statements and comments regarding victims rights in order for the prosecutor to convince the jury to sentence Defendant, Tony Mann, to death. The prosecutor, in emphasizing a victim's rights and invoking societal alarm argued:

> "Have you ever wanted to stand up and say, that's enough? Have you ever been in the position in your life where you've looked at what somebody has done and what they've done wrong to one or more other people, and say, that's enough? In this particular case, the evidence that you've heard is that Anthony Wayne Mann, participant in the torture, murder of Charles Keene. That's enough."

In this particular phase, the prosecutor characterized the Defendant as "trying to play the game to beat the system again."

The prosecutor emphasized the photographs and finally requested the jury to not allow the law to fail again as it had failed in allowing Charles Keene to die. The prejudicial effect of all of these statments was compounded by the prosecutor's reference to inadmissible heresay statements. This was so prejudicial in that the only conclusion the jury could reach is that the death penalty was the only appropriate sentence, the only appropriate penalty. This attempt to invoke some societal or civic responsibility of the juror, victim's right and sympathy has been clearly recognized as error by the Oklahoma Criminal Court of Appeals. Cooper v. State, 580 P.2d 234 (Okl. Cr. 1978); Scott v. State, 649 P.2d 560 (Okl. Cr. 1982); and Tobler v. State, 688 P.2d 350 (Okl. Cr. 1984).

The comments of the prosecutor exacerbate the effect of the photographs and the jury's consideration of them. Such evidence and comments hardly can be deemed to be harmless when during deliberations two incidents occurred which indicate the obvious confused state of at least one or two jurors.

The first incident was reported by the bailiff, who informed the judge that one of the jurors approached the baliff, talked to her and advised her, "maybe I need to speak with the Judge. I am not going to change my mind." Following that incident, at some time later, a note was received by the trial judge. The note read:

> "If I found the Defendant guilty on the grounds of aiding and abetting and also agree that it was hideous, and the aggravating outweighs the mitigating circumstances, are you ordering us to vote the death penalty. I apologize for bothering you."

Following these incidents, the jury sentenced the Defendant, Tony Mann, to death.

To allow a human being to be processed through the criminal justice system with such inconsistency of review by the state appellate court of identical evidence and where the prosecutor violates the elementary standards of fairness, and when jurors, after having been prejudiced by evidence or influenced to possibly improperly change their minds, as indicated by the juror

incidents herein, surely there exists an unacceptable risk that the death penalty in this case was imposed in an arbitrary and capricious manner in violation of the Defendant's rights granted by the Eighth Amendment of the United States Constitution. If there is any doubt as to prejudice, the Defendant, Mann, should receive the benefit of that doubt, Sykes v. State, 95 Okl. Cr. 14, 238 P.2d 384, 387-388 (1951). For these reasons this Court should accept review of this case and reverse this matter for a new trial or award other appropriate relief.

II

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE ELEMENTS AND PUNISHMENT FOR THE OFFENSE OF MANSLAUGHTER IN THE FIRST DEGREE

The trial judge refused to grant defense counsel's request to instruct upon manslaugher in the first degree. The trial transcript is replete with evidence requiring this instruction on this lesser included offense.

The following are references to testimony in the trial record evidencing the state of intoxication of the Petitioner and his co-defendants: TR 378, witness co-defendant Wayne Thompson's testimony as follows:

> **"Q. I'd ask you to direct your attention back to the early evening hours of January 23rd and just tell this jury what happened that night.**
>
> **A. Okay. Let's see. I had been down the creek messing around.**
>
> **Q. You might want to scoot that microphone back towards you, Mr. Thompson, so the jurors can hear you better. Even a little closer.**
>
> **A. Okay. That evening I went on the creek messing around and I come home, went in mamma's house, the big house, to eat, and then I went out to the little house where Tony was staying and him and Rick and Bob was all getting drunk and stuff and I ask them if I could join them, you know."**

And further at TR 379:

> **"Q. The--- approximately what time of day or night, what day of the week was this?**
>
> **A. The 22nd of January, 1983 on a Saturday.**
>
> **Q. And approximately what time of day or night was it?**
>
> **A. Huh, it was -- when I got home it was probably six or seven o'clock in the evening.**
>
> **Q. And would you continue with your story when you said you went out to the little house and asked if you could join them. First of all, what people were in the little house when you went to it?**
>
> **A. As long as I can remember just Tony, Ricky, and Bob.**
>
> **Q. Would you give us their complete names, please?**
>
> **A. Anthony James Mann, Richard Jones and Bobby Joe Glass.**
>
> **Q. Those three people were in the little house and you went to it to see if you could join when they were drinking?**
>
> **A. Yes, sir.**
>
> **Q. Tell us in your own words, sir, what happened after that?**
>
> **A. Well, like I say, we was setting out there drinking and we got ahold of some Valiums and smoking marijuana and Tony said, let's go see if Charles is still at my sister Vicki's house in Amber. And you know, he just said, maybe whoop him and put him out on the highway."**

And at TR 383 he testified:

> **"Q. After you dropped off Mr. Knight were did you go?**
>
> **A. We stopped at the Stork Club and Tony and Ricky went inside and me and Bobby stayed outside and talked."**

And at TR 384 he testified:

> **"Q. How long did you stay at the Stork Club?**
>
> **A. I don't really know. I know it was an hour, probably longer but I kept -- I had to go in -- well, I went in three time and the third time they come back out with me."**

And at TR 387 Wayne Thompson testified as follows:

> **"Q. What condition was -- you say that every body was drinking that day. What condition was everybody in with regard to how drunk or sober they were?**
>
> **A. We was all fairly drunk. Especially Tony and Ricky.**
>
> **Q. What condition was Ricky Jones in when you left the Stork Club?**
>
> **A. Very drunk.**
>
> **Q. And what did he do at that time in the car?**
>
> **Q. He passed out.**
>
> **Q. So the rest of that evening until --- I'm getting into a lot of other things with you, but the rest of that evening what condition was Ricky Jones in?**
>
> **A. Passed out until we got home."**

And Wayne Thompson testified further at TR 398 after picking up of Charles Keene by the co-defendants:

"Q. When you got down to the bridge out there, just tell us in your own workds what happened at that point?

A. Okay. We stopped there at the bridge---Tony stopped on top of the bridge and, you know, told Charles, he said, 'Well, we're going to whip your butt before we let you out'.

Q. Who said that?

A. My big brother, Tony. And he got out, you know, and had a bottle of whiskey in his hand and kind of staggered around to my side of the car.

Q. Who did?

A. My brother Tony. And he was fixing to open the door and I was fixing to open the door and by the time the door popped open Charles hit me and busted my nose on the door and busted it, you know, made it bleed on the outside up here. But the door hit Tony and about knocked him off the bridge and knocked me down on the bridge and Charles got out and took off running toward Opossum Brown's house."

And further at TR 403 he testifies regarding what happened after the struggle at Opossum Brown's house:

"Q. When you got there on the porch after this beating had taken place, how did you get Charles Keene off the front porch to the car?

A. We carried him, you know, kind of dragged him, carried him.

Q. Whose we?

A. Me and Bobby. Tony was too drunk to pick anything up.

Q. Pardon me?

A. Tony was too drunk to pick anything up.

Q. If Tony's too drunk to pick anything up, why is tony Mann driving the car?

A. Well as you can --- as we pointed out earlier, Tony, you know, its -- was 27 at the time and I imagine he's had quite a bit of whiskey and beer between the time he started drinking and that time. He can, you know, probably drive a car pretty easy, it ain't nothing like picking somebody up."

Wayne Thompson further testified at TR 405 that while driving the car the co-defendants and Charles Keene were occupying, the Petitioner collided with a gate on the way to the river bank, and that the Petitioner was not at the immediate scene where the homicide occurred.

The lesser included offense doctrine developed at common law to assist prosecutors in cases where the evidence failed to establish some element of the offense originally charged, and the defendant is entitled to that instruction if the evidence would

permit a jury rationally to find him guilty of the lesser included offense and acquit him of the greater. Keeble v. United States, 93 S.Ct. 1993, at 1995 (1973). Even recently, this court has found that a entrapment instruction should be given even if a defendant denies one or more elements of the crime whenever there is sufficient evidence from which a jury could find entrapment. Mathews v. United States, 1085 at 883 (1988).

The Oklahoma Court of Criminal appeals has stated on many occasions that it is the duy of the trial Court to determine as a matter of law whether the evidence is such as to justify the submission of Instructions on lesser and included offenses of murder in the first degree, and if there is any doubt about the matter in the mind of the trial court, the lower degrees of homicide should be submitted for consideration by the jury. Hanna v. State, 560 P.2d 985 (Okl.Cr. 1977).

The parallel of the necessity to give the entrapment instruction, to the duty to give a lesser included offense instruction was recognized by this court in Mathews, supra., which relates to the intent to commit the crime. The Defendant Mann was entitled to such a requested instruction as previously recognized by this Court in Stevenson v. United States, 16 S.Ct. 839 (1896).

The evidence presented at trial by the State's witnesses concerning the Defendant Mann's consumption of alcohol and drug use, and the level of his intoxication, leaves little doubt that the Court should have instructed the jury on the lesser degrees of homicide, as it is possible the jury could have found properly from the evidence that the Defendant Mann was in such a state of intoxication as to prevent him from forming a premeditated intent to kill Charles Keene. This is particularly true in view of the fact that there is no evidence on the record showing that the Petitioner was an active participant in the physical acts employed to wound, injure, and kill Charles Keene.

III.

DEFENDANT, MR. MANN, CANNOT LAWFULLY BE EXECUTED FOR THE REASON THAT THE ONLY AGGRAVATING CIRCUMSTANCE FOUND WAS OKLAHOMA'S "ESPECIALLY HEINOUS-ATROCIOUS-OR-CRUEL" AND THIS AGGRAVATING CIRCUMSTANCE IS CONSTITUTIONALLY INVALID

Mann was sentenced to death after the jury found only one statutory aggravating circumstance. The validity of a death sentence based in part on consideration of an invalid aggravating circumstance 'depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute and on the reasons that the aggravating circumstance at issue...was found to be invalid.' Zant v. Stephens, supra.; Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987). Death being qualitatively different from other punishments must be imposed with heightened scrutiny, to assure compliance with the Eighth Amendment, prohibition against cruel and unusual punishments. Cartwright v. Maynard, supra.

In the capital punishment statutory scheme, the aggravating circumstance performs the function of channeling the discretion of the sentencer. The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Cartwright v. Maynard, supra. To properly guide the sentencer, the attention of the sentencer must be directed to a particular aspect that justifies the death penalty such as where more than one person was killed by the acts of the defendant, the victim was pregnant or the murder was committed by hidden explosive. Cartwright v. Maynard, supra. at 1485. If a standard is so vague that it fails to adequately channel the sentencer's discretion that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman may appear. Zant v. Stephens, supra. at 2742. Furman v. Georgia, 92 S.Ct. 2726.

Notwithstanding the many states that contain a similar aggravating circumstance such as Oklahomas, "especially heinous, atrocious or cruel", 21 O.S. 1981, Section 701.12(4), the interpretation of the statutory aggravating circumstance may be so broad to vitiate the role of the circumstance in guiding the

discretion of the sentencer. McKlesky v. Kemp, 107 S.Ct. 1756 (1987). The definitions employed by the Oklahoma Court of Criminal Appeals have been deemed to be unconstitutionally vague in Cartwright v. Maynard, supra, at 1490.

This unchanneled discretion is illustrated in this particular case where the note from the juror indicated that she had found the death in this case "hideous". This language from the note of the juror indicates the overly broad application of this aggravating circumstance rendering the aggravating circumstance in and of itself the "standardless standard." Rosen, the "The Especially Heinous" Aggravating Circumstance in Capital Cases-The Standardless Standard, 64 N.C.L.Rev. 941, 954 (1986) Cartwright v. Maynard, supra. at 1485.

The failure of the Oklahoma court's to provide a constitutionally adequate narrowing construction of this aggravating circumstance renders the sentence of death on Tony Mann invalid under the prohibition of the Eighth Amendment of the United States Constitution.

CONCLUSION

The Defendant, Anthony James Mann, should not be executed and his case should be reversed for a new trial for the reliability of the death sentence in this case has been undermined by the errors at trial and error in the application of the unconstitutionally vague aggravating circumstance which was found by the jury.

Respectfully submitted,

ANTHONY JAMES MANN

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY JAMES MANN,)
Appellant,)
v.) Case No. F-84-217
THE STATE OF OKLAHOMA,)
Appellee.)

FOR PUBLICATION

FILED
EXECUTIVE & LEGISLATIVE APPEALS
STATE OF OKLAHOMA
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O P I N I O N

BRETT, Presiding Judge:

Appellant, Anthony James Mann, was convicted of Murder in the First Degree in Grady County District Court Case No. CRF-83-45. 21 O.S.1981, § 701.7. He was given the death penalty and he appeals.

The victim, Charles Keene, was abducted and murdered in the early morning hours of January 23, 1983. His body was weighted with a heavy chain, fastened to a cement block and dropped in the Washita River. He had multiple contusions, cuts, including a slit in his throat and a broken leg. The cause of death, however, was attributed to two gun shot wounds, one in the head and one in the chest. At the time of Keene's death, he was staying with his ex-wife, Vickie Keene, and their two young children. He was abducted from her home on the night of his death.

Four people were charged with the first degree malice aforethought murder of Keene; they were: William Wayne Thompson, Bobby Joe Glass, Richard Jones and appellant. Appellant was Keene's ex-wife's 27-year-old brother and Thompson was her 15-year-old half-brother. The other two defendants were friends of Mann and Thompson. The four defendants were tried separately; all of them were found guilty and given the death penalty. At the time of this trial, Glass had been killed in prison.

The first witness called by the State was 15 year-old Thompson who was the self-proclaimed triggerman and planner in this case. It is from him that we get the story. Although divorced, Keene had been physically abusing his ex-wife, Vickie Keene. Mann and Thompson's plan on January 22, was to put a stop

to the problem. Earlier that afternoon, Keene had chased appellant and Danny Mann, another brother, out of Vickie Keene's trailer house with a butcher knife. They had gone there with her to get her car. After this encounter, they went to see a deputy sheriff for help but were told nothing could be done. Tony Mann then gave his .45 caliber semi-automatic pistol, the murder weapon, to Vickie Keene so she could defend herself.

Thompson had heard about this episode from his mother and had seen the loaded gun on the kitchen cabinet at his mother's house. Glass, Jones, Mann and another man were sitting around on that Saturday evening drinking, smoking marijuana and taking valiums when Thompson asked appellant if he could join them; Mann agreed. During the evening, Mann, as the leader, hatched the plan to run Keene off by beating him up and putting him out on the highway with instructions not to come back. Thompson claimed that unknown to Mann, he and Glass put a cement block and chain in the trunk of the car and got the gun from the kitchen to take with them. Thompson said he and Glass intended at that time to murder Keene and dispose of the body by submerging it in the Washita River. This was the plan that was carried out.

Keene offered little resistance when they went to get him. Mann drove to the river with Glass and Thompson on either side of Keene in the back seat. Jones was passed out in the front seat. When they got to the river, Mann told Keene they were going to beat him up, he broke free and ran for the home of a Mr. and Mrs. Brown. A scuffle ensued and Thompson pulled out the gun. Keene, at 200 pounds, was substantially larger and stronger than Glass who was not large or Thompson who weighed only 115 pounds.

So as Thompson put it, "I was going to even up the size so I got that .45 and he grabbed it." The gun went off and was knocked out of Thompson's hand. We find from the Browns' testimony, the shot awakened them. Keene ran up on the porch and yelled for them to call the sheriff that "they" were trying to kill him. In addition to the gun one of the men had a stick which was used to knock Keene out. The sheriff did not arrive before the badly beaten Keene was loaded unconscious in the trunk

of the car and driven to the second location on the river. That is where the actual murder took place and the body was dumped. Thompson thinks Glass had the stick and that Keene's leg was not broken until later, although he is not sure when that occurred.

Thompson went on to testify that Mann tried to stop on the highway to let Keene out and at that point he pulled the gun on Mann and directed him where to go. Thompson claims he asked Mann to help with the murder but he refused and walked up the road until it was over. Thompson and Glass drug the unconscious Keene out of the trunk and down to the river. Keene then woke up and started beating on Glass. Glass was on the ground and it was then that Thompson shot Keene and Glass then grabbed the gun and also shot Keene. Then the two of them put the body in the river.

By Thompson's account of the events the last time Mann had any contact with Keene was at the Brown's house when Keene was unconscious. Contradicting testimony from other witnesses tells us that Keene, knowing he was going to be killed, asked Mann to take care of his children and that Mann retrieved some personal effects, a lighter and pocket knife, from Keene's body which he gave to his sister later. The implication is that these two events took place at the death scene contrary to Thompson's testimony. Thompson claimed, even though a shot had been fired at Brown's, that Mann did not know he was armed until he pulled the gun on him when they were back on the highway headed for the second stop.

This was not the first time a member of Vickie Keene's family had shot Charles Keene. Several years earlier, a brother-in-law had shot him because he thought Keene was going to kill her child. No charges were filed at that time.

Appellant's first assignment of error is an objection to the admission of a color video tape recording of Keene's body being recovered from the river. The only objection made at trial was that the exhibit was more prejudicial than probative. On appeal, however, appellant is also claiming the state failed to lay a proper foundation for the introduction of this exhibit. Appellant's failure to object at trial, that the state had not

established the admissibility of the exhibit before it was offered, is a waiver of this issue. 12 O.S.1981, § 2104(A).

Appellant admits the video tape is relevant, but claims it was superfluous and prejudicial and, therefore, should have been excluded. 12 O.S.1981, § 2403. We find this evidence was not unduly gruesome or repetitious, as appellant claims; and we agree it was relevant. Therefore, we find no error in allowing the jury to see the limited portion of the video tape that was admitted. Thompson v. State, 724 P.2d 780, 782 (Okl.Cr.1986).

Appellant's second proposition of error is an objection to the introduction of four color photographs. The same pictures were offered in evidence in appellant's brother's case. As we found in that case, two of the photo exhibits, numbers 10 and 11, should not have been admitted due to their gruesome nature. Thompson, 724 P.2d at 782, 783. Although these photos were taken at the same time and the subject is essentially the same as in the video tape, due to the sharper focus and closer range the result is two inordinately grisley pictures of the body. The pictures show the mud, blood, and slime from the river, the slit in the victim's throat and the entry wounds of the bullets in the chest and head. However, the case against appellant was sufficient and we do not find this evidence affected the jury's verdict. Thompson v. State, 724 P.2d at 783. We do not find it was error to admit the other two photographs. Exhibit 9 showed the chain and block fastened to Keene's legs and was therefore more probative than prejudicial. Exhibit 8 was Keene's water logged belt which of course was not in the least gruesome. We find no error in the admission of this evidence.

In appellant's third proposition of error, he objects to the trial court's failure to instruct the jury on First Degree Manslaughter and Second Degree Murder. This contention is based on a claim that there was substantial evidence appellant was so intoxicated with drugs and liquor as to be incapable of forming the specific intent necessary to meet the first degree murder criteria. Appellant claims the court had an independent

obligation to give instructions on these two theories even though appellant did not request them at trial. Gibson v. State, 501 P.2d 891, (Okl.Cr.1972). At trial, appellant's request for a heat-of-passion manslaughter instruction was denied, and it is not that issue that is now being questioned. This issue is based solely on a claim of diminished capacity due to intoxication.

Wayne Thompson's testimony was the only evidence offered to prove appellant was intoxicated on the night of the homicide. He did not estimate the volume of intoxicants taken or the time frame involved; he merely offered his opinion that appellant was drunk. The evidence shows Mann drove the car that evening around Chickasha, to and from Amber, a distance of 12 miles, and to two different locations on the Washita River, apparently without difficulty. According to Thompson, Mann said to him and Glass, "you all know it's Murder." Taking Thompson's testimony as accurate, Mann was not too drunk to know what was taking place.

Therefore, Thompson's testimony, taken as a whole, belies his claim Mann was intoxicated beyond a point which he could form the intent required to commit first degree murder. We find evidence of first degree murder, and we find no evidence to warrant instructions on any lesser offenses or of the alternate offense of second degree murder. See Franks v. Alford, 830 F.2d 345 (10th Cir.1987). The jury was properly and adequately instructed. See Seegars v. State, 655 P.2d 563 (Okl.Cr.1983); Wilson v. State, 649 P.2d 784 (Okl.Cr.1982); Johnson v. State, 632 P.2d 1231 (Okl.Cr.1981).

Appellant claims in proposition four that the Court prematurely excused one of the veniremen for cause. The juror in question, Juror Norman, admitted to knowing appellant's family very well, that he was well informed about the case, and that he had already formed an opinion as to the guilt or innocence of Mann. Neither the prosecutor nor defense counsel objected when the court excused this juror for cause. We find this issue was not preserved for review. Nuckols v. State, 690 P.2d 463, 468 (Okl.Cr.1984).

Propositions five, six and seven also deal with belated objections to voir dire. Appellant objects to the manner in which the court questioned the veniremen about assessing the death penalty. This objection is based on two types of complaints. First, appellant claims the Court did not make it clear to the veniremen that they had to answer the guilt/innocence question before they addressed the punishment question. Secondly, appellant claims the court's questions to the prospective jurors were suggestive, to-wit: "[I]f a person is convicted of murder in the first degree, punishment is either death or life imprisonment." The only authority cited by appellant in support of this objection is 12 O.S.Supp.1982, Ch. 2, App. Rule 6, which is a general description of voir dire and is not an aid to this court for finding in appellant's favor that error was committed. The merit to this objection escapes this court, as apparently it did the trial court and trial counsel.

In propositions six and seven, appellant is making similar semantical objections. He objects to the prosecutor's inquiry regarding an unrelated death case the prosecutor had tried earlier that involved residents of the venireman's small community. Appellant claims it was not clear that the instant case and that old case were wholly unrelated. The other objection was to the failure of the Court, sua sponte, to admonish a venireman when he said: "I've heard, you know, just that the murder took place." Appellant contends this layman's use of the term "murder" prejudiced the other prospective jurors. In none of the instances cited by appellant did trial counsel object, therefore, any error, real or imagined, was waived. Nuckols, 690 P.2d at 468.

In proposition eight, appellant claims the court erred in not treating Vicki Keene as an accomplice for procedural purposes. Vicki Keene was the victim's former wife and appellant's sister. The evidence showed that the victim's protracted abuse of Mrs. Keene was the reason he was killed. There was no evidence to establish Vicki Keene as an accomplice. 21 O.S.1981, § 172. It is pure conjecture to transform her into

an accomplice merely because she was the person who, theoretically, would benefit the most from Keene's death and because she did not report his death when she learned of it. There was no evidence that she helped plan the murder, that she participated in it or that she witnessed it. Not being a co-conspirator or accomplice, her testimony did not need either corroboration or a limiting instruction. Edmondson v. State, 532 P.2d 81, 84 (Okl.Cr.1975).

In proposition nine, appellant claims prejudicial hearsay evidence was admitted over his objection. The testimony in question was given by Benny McCarthy. McCarthy saw Thompson, Glass and appellant at Dorothy Thompson's house, shortly after they came back from the river. Dorothy Thompson is appellant's mother. McCarthy was a witness to a conversation between Mann, Glass, Mrs. Thompson and Charlesetta Garcia (McCarthy's sister). They were discussing the murder and the need to conceal or dispose of evidence. According to McCarthy, Mann said they needed to return to the river in daylight to see if the body was visible from the bank, and to get rid of the gun. Later Sunday morning, Glass asked McCarthy to go with him and Vickie Keene to the river. It is the conversation between Glass and McCarthy on the way to the river that is the basis of the hearsay objection. At the time of trial, Glass had been killed in prison so he was unavailable to testify. See 12 O.S. 1981, § 2804(a)(4).

The State claims McCarthy's testimony fits an exception to the hearsay rule and was, therefore, admissible. 12 O.S.1981, § 2801(4)(b)(5). See also United States v. Inadi, _____ U.S. ____ 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). They contend that the trial court had already made the requisite independent finding a conspiracy existed; we agree. The conspirators were Mann, Thompson, Glass and Jones. The conspiracy started at the Thompson home on the evening of January 22 and continued to and through the kidnapping, beating, murder, concealment of the body, alteration of the crime scene during the daylight hours of the 23rd and the sale of the gun sometime later. The importance of this testimony was to both corroborate as well as impeach

Thompson's testimony; Thompson claimed Mann participated in the kidnapping and beating but not in the murder. McCarthy testified to a version of the facts that Glass had related to him which inferentially contradicts Thompson's claim that Mann was not involved in the murder, but only the kidnapping and beating. We agree this case falls within the limits set out in 12 O.S.1981, § 2801(4)(b)(5). It was admissible testimony for McCarthy to relate the statements made either to him or in his presence by two of the co-conspirators during the continuation of the conspiracy. See Burns v. State, 80 Okl.Cr. 554, 129 P. 657, 663 (1913); United States v. Gomez, 810 F.2d 947, 950 (10th Cir.1987).

In proposition ten, appellant is again making a belated objection to the introduction of a photographic exhibit without a proper foundation. The exhibit is a picture of Malcolm "Opossum" Brown's front porch; no objection was made at trial, and there was nothing inflammatory about the picture. We find this issue was not preserved for review. 12 O.S.1981, § 2104.

In proposition number eleven, appellant claims he was the victim of an evidentiary harpoon and that the court overruled his objection to the offending testimony. The witness was one of the police officers who transported appellant from Eufaula where he was arrested back to Chickasha. Mann asked if they had made an arrest in another case, unquestionably unrelated to this case. Mann commented that it was "pretty bad them cutting her up like that. . . ." The deputy replied, "you don't have much room to talk" and Mann replied, "I know, but it wasn't supposed to happen that way." The prosecutor's purpose in offering this statement was to show an admission of guilt by Mann. Appellant claims this testimony was susceptible of three different interpretations by the jury. He claims the jury might have thought appellant was involved in the other crime, or in another similar crime or that he was admitting he was guilty. From reading the transcript of the trial, we do not believe the jury would have thought Mann was in any way connected to the other case. This dialogue between the officer and Mann does not represent an evidentiary harpoon.

The officer was answering a direct question put to him by the prosecutor. See McGowan v. State, 662 P.2d 1389 (Okl.Cr.1983). The evidence elicited by the prosecutor was not evidence of other crimes; it was probative of the facts in issue, and it was more probative than prejudicial. Odum v. State, 651 P.2d 703, 705 (Okl.Cr.1982).

In proposition number twelve, appellant objects to testimony by Charlotte Mann, appellant's former wife. She related a conversation she heard after the murder where Wayne Thompson was telling his mother he had killed Keene. She also testified Mann told her immediately after the murder that Keene asked him to take care of his kids. These statements were consistent in part with Thompson's testimony. See Lewis v. State, 586 P.2d 81, 82 (Okl.Cr.1978). Appellant did not object, therefore, this issue was not preserved for review. See Wilson v. State, 554 P.2d 806, 809 (Okl.Cr.1976).

In proposition thirteen, appellant is objecting to the introduction of an exhibit that was a vial of the victim's blood. He claims it was irrelevant and prejudicial. We find the exhibit was somewhat obscure but nonetheless harmless. Appellant's failure to object at trial was a waiver of this objection. 12 O.S.1981, § 2104.

In propositions fourteen, fifteen, and sixteen, appellant is objecting to portions of the prosecutor's closing argument. Trial counsel did not see fit to enter contemporaneous objections to these three statements so we will consider them only for fundamental error. The prosecutor described Mann as a "corpse robber" which was a reference to Mann's removal of the knife and lighter from Keene's inert body. It was a poor, although accurate, choice of words. The second objectionable comment was a brief remark on the jury's role in law enforcement in general. The third reference was a comment by the prosecutor that Thompson's testimony in a prior trial was consistent with his testimony in this case. Appellant's guilt was strong enough to overcome any prejudice these three comments might have caused in a weaker case; we therefore find no error. See Glass v. State, 701 P.2d 765, 770 (Okl.Cr.1985).

In the second stage of the trial, in proposition seventeen, appellant objects to the introduction of two exhibits, No. 35 and 36. These exhibits were letters that were passed from appellant to Glass surreptitiously in the county jail while awaiting trial. Glass, of course, was deceased by the time of this trial, and Mann did not testify. The authenticity of the exhibits, i.e., the verification of the author, was provided by testimony from Mann's ex-wife, Charlotte, that the letters appeared to be in Mann's handwriting. Appellant claims the letters are other crime evidence, the other crime being perjury, and claims, therefore, that a Burks notice was necessary. Burks v. State, 594 P.2d 771 (Okl.Cr.1979).

At trial, appellant made two objections to those exhibits. The first one was an objection to the method chosen by the state to prove appellant was the author. The second was a claim that if they were admissible at all they should have been offered in the first stage, that they were irrelevant in the second stage, and due to the profanity in them they were prejudicial. There was no objection made that a Burks notice was not given. We do not find that Burks applies to the second stage of a death penalty case. It would be redundant to make such a requirement since the language of the sentencing statute provides for a similar type of notice, to-wit:

> Only such evidence in aggravation as the state has made known to the defendant prior tc his trial shall be admissible. . .

21 O.S.1981, § 701.10.

Appellant was furnished with copies of the letters on November 28, 1983, which was three months prior to trial. On appeal, appellant did not advance the objections he made at trial, therefore, they will not be considered. We find no error in the admission of this evidence.

In propositions eighteen and nineteen, appellant objects to the manner in which the prosecutor cross-examined appellant's eight character witnesses. The prosecutor asked each of them if they were aware of appellant's criminal record and went into some detail in that regard. Appellant was on notice his record would

be used to prove he posed a continuing threat to society. 21 O.S.1981, § 701.12. His record consisted of a charge of second degree burglary in Beckham County and a Grady County charge of possession of marijuana. He received a deferred sentence and a suspended sentence, respectively, in those cases. An application was filed for revocation of the suspended sentence based on a claim appellant concealed stolen property, the property being a pistol. The state did not, although it would have been appropriate, introduce his record in the second stage; the first time it was used was in cross-examination of the character witnesses. See 12 O.S.1981, § 2405. It was relevant to question the witnesses to determine if their opinion of appellant took in consideration his criminal record. Kennedy v. State, 640 P.2d 971, 981 (Okl.Cr.1982); Boomershine v. State, 634 P.2d 1318 (Okl.Cr.1981).

Appellant also claims the court erred in not instructing the jury that the questions were asked "to test the credibility of the character witnesses only, and not to prove that the defendant was a bad person. . . ." Trial counsel did not request such an instruction, and appellant has cited no authority for the trial court to have given one sua sponte. This evidence was admissible on other grounds and not for the limited use appellant claims. See Johnson v. State, 665 P.2d 815, 822 (Okl.Cr.1982). Likewise, we find no error in the form of the questions asked by the prosecution. The jury did not find appellant to be a continuing threat to society.

In proposition twenty, appellant is objecting to the prosecutor asking one of the character witnesses if he was"[a]ware of what Tony Mann and the three co-defendants did to Charles Keene--what they've been convicted of doing to Charles Keene and his body?" This objection is fortified by the trial court's granting of a motion in limine made by appellant at the commencement of trial prohibiting any reference to the conviction of the other three people charged with this murder. By the second stage of trial, the jury already knew there were three other people involved and since they had just found Mann guilty, it

should not have been of any significance to them the other three had also been convicted. They were not told what penalty the other defendants were given. Had they been given that information this objection might have some merit. However, this line of inquiry ceased before any harm was done. Although, this evidence has little probative value, appellant has failed to show he suffered any prejudice from the admission of it. 12 O.S.1981, §2403.

Propositions twenty-one and twenty-two deal with prosecutorial asides. Appellant recites some sixteen statements which he finds objectionable. Trial counsel also found them objectionable in most of those instances, and the court sustained his objections with admonishments to the jury. We have reviewed these remarks and find the prosecutors came very close to causing an abortion of an otherwise fair trial with their insistence in ignoring the standards for what is proper closing argument. We do not, however, find reversible or modifiable error in the trial court's handling of this problem. See Frazier v. State, 607 P.2d 709, 711 (Okl.Cr.1980).

The other objectionable remark by the prosecutor was a partially completed definition of "reasonable doubt". Trial counsel immediately objected and that was the end of that attempt. We do not find it should have caused the jury any confusion and therefore we find no error in what transpired. See Williams v. State, 572 P.2d 257 (Okl.Cr.1977).

In propositions twenty-three, twenty-four and twenty-five, appellant contends the jury's verdict imposing the death sentence was not supportable by the evidence or in comparison to other similar cases. Appellant claims Charles Keene's death was not especially heinous, atrocious, or cruel. 21 O.S.1981, § 701.12. Although charged with a second aggravating circumstance, to-wit: "The existence or probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" the jury found only the one aggravating circumstance.

The facts of the case demonstrate Keene was undoubtedly subjected to extreme physical abuse, resulting in a great deal of pain and fright for an extended period of time before the fatal wounds were inflicted including being locked in the trunk of the car after the beating. See Stouffer v. State, 742 P.2d 562 (Okl.Cr.1987)(opinion on rehearing). There was testimony that he knew when he was at the Brown's house that he would be killed. This was illustrated by his plea for help from the Brown's as well as his "death bed" request of appellant "[to] take care of his boys and to raise them right". We cannot find error in the jury's verdict that the aggravating circumstance outweighed any mitigating circumstances. See Banks v. State, 701 P.2d 418 (Okl.Cr.1985); Nuckols v. State, 690 P.2d at 463.

We no longer have a mandate by statute or case law to do a review of this case and compare it to other cases where the death penalty was imposed. See 21 O.S.Supp.1985, § 701.13; Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

By way of further argument, appellant cites in support of a claim the death penalty should not attach Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and Hatch v. State, 662 P.2d 1377, 1383 (Okl.Cr.1983) cert. denied, __ U.S. _____, 106 S.Ct. 834,88 L.Ed.2d 805 (1986). He contends this Court should, on a case by case basis, conduct a review at the sentencing stage of a defendant's intent and participation in a killing to determine if his Eighth and Fourteenth Amendment rights have been violated. See also Tison v. Arizona, ____ U.S. ____, 107 S.Ct. 1676, _____ L.Ed.2d ___ (1987); Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Hatch like Enmund and Tison was tried as a felony murder. In Oklahoma in a felony murder, the elements necessary for a guilty verdict do not provide for a finding of intent to kill, attempt to kill, kill or that lethal force be used. Hatch, 662 P.2d at 1383. Unlike felony murder, however, the absence of a finding of intent in a malice aforethought murder will defeat a conviction at the guilt stage in Oklahoma. See 21 O.S.1981, § 701.7(A). To apply the Enmund criteria and its progeny in a malice aforethought murder at the

sentencing stage, would be the equivalent of asking the jury to re-examine their finding of guilt. An Oklahoma jury must accept that the intent to commit murder is an established fact when they reconvene for the sentencing stage in a malice aforethought murder. See 21 O.S.1981, § 701.11. This of course assumes they were properly instructed, which was the case in Mann's trial.

In the remaining four propositions, appellant cites instances where judicial discretion was exercised and he finds fault with the outcome of the trial court's decisions. He claims these alleged abuses resulted in preventing him from having a fair trial. We find those claims have no merit.

In supplemental filings, appellant has presented six additional arguments with citations all of which have been addressed above, with the exception of a pro se "supplemental brief" that was filed by appellant contrary to the advice of appellate counsel. Ordinarily, this court will not consider, or even accept for filing, pro se offerings when an appellant is represented by counsel. 22 O.S.1981, ch. 18, App.--Rules of the Court of Criminal Appeals, Rule 3.4(E). However, appellant has attached a copy of his attorney's response to his request that an additional issue be included in his direct appeal. Appellate counsel erroneously advised appellant that the issue "be raised in an application for post-conviction relief." The law is well settled on the scope of a post-conviction relief review. 22 O.S.1981, § 1086. Issues that could have been raised on direct appeal and are not are presumed waived for post-conviction relief purposes. Maines v. State, 597 P.2d 704 (Okl.Cr.1979). In line with Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), this issue will be addressed at this time.

Appellant alleges that one of the jurors had an unauthorized communication with the bailiff outside the juryroom during deliberations. Appellant relates that "someone" heard a juror say: "I'm not going to change my mind, I just can't do it--I will not give the Death Penalty." This was called to the Judge's attention immediately and, under oath, he questioned the bailiff in the presence of appellant, his attorney and the

prosecutor, and a record was made. The bailiff said she did not recall exactly what was said but thought the juror said "[m]aybe I need to talk to the Judge, because I'm not going to change my mind." The bailiff told her to tell the foreman. This is substantially different from the quote the unidentified person was supposed to have heard. However, in both instances there is no claim the bailiff responded to the juror in an inappropriate manner or that the other requirements of 22 O.S.1981, § 857 were not kept. This took place in earshot of the jury near the door. This communication was unsolicited and fell within the bounds of what is permitted by way of communication with a bailiff under Section 857. Before there is a presumption of prejudice, which the state would have to rebut, it must first be established that an unauthorized communication took place. Born v. State, 397 P.2d 924, 935 (Okl.Cr.1964); cert. denied, 379 U.S. 1000, 85 S.Ct. 718, 13 L.Ed.2d 701 (1965). We do not find reversible error in the scenario related by appellant nor do we find the trial judge erred in the manner he handled the problem.

Therefore, this Court finds appellant was afforded a fair trial, and the jury verdict was not arbitrarily entered nor was it the by-product of passion or prejudice, being otherwise sufficient for a guilty verdict. See Spuehler v. State, 709 P.2d 202 (Okl.Cr.1985). The aggravating circumstance was supported by competent evidence. 21 O.S.Supp.1985, § 701.13(c). Therefore, the judgment and sentence is AFFIRMED.

IN THE DISTRICT COURT OF GRADY COUNTY, OKLAHOMA
THE HONORABLE JAMES R. WINCHESTER, DISTRICT JUDGE

ANTHONY JAMES MANN, appellant, was convicted of Murder in the First Degree in Grady County District Court Case No. CRF-83-45. He was given the death penalty, and appeals. JUDGMENT AND SENTENCE IS AFFIRMED.

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OPINION BY: BRETT, P.J.
BUSSEY, J.: CONCURS
PARKS, J.: DISSENTS

PARKS, Judge, Dissenting:

The instant case is the last in a series of three cases involving the murder of Charles Keene on January 23, 1983. Appellant, Wayne Thompson, Bobby Glass and Richard Jones, were each tried separately, convicted of first degree murder, and sentenced to death. Glass died in prison. This Court affirmed the judgment and sentence against Thompson. **Thompson v. State**, 724 P.2d 780 (Okla. Crim. App. 1986). Jones' conviction was reversed and remanded for a new trial based on three errors: (1) improper admission of photographs, (2) improper admission of hearsay, and (3) prosecutorial misconduct. **Jones v. State**, 738 P.2d 525 (Okla. Crim. App. 1987). In **Jones**, a majority of this Court concluded that the record evidence against Jones was not strong enough to overcome the errors. **Id.** at 531. Although the record evidence against appellant is arguably somewhat stronger than the record evidence was against Jones, it clearly does not rise to the level of overwhelming evidence found in **Thompson**, **supra**, at 783, and I cannot say that the evidence of guilt was such as to overcome the errors present in this case.

The majority concedes at page four (4) that the trial court erred in admitting State Exhibits Nos. 10 and 11, consisting of gruesome photographs with little or no probative value, during the guilt-innocence stage. **Accord Jones**, **supra**, at 528; **Thompson**, **supra**, at 782-83. Concerning the admission of McCarthy's testimony concerning hearsay statements made by appellant and Glass after the death of the victim, it should be noted that appellant's trial occurred prior to our decision in **Laske v. State**, 694 P.2d 536, 538-39 (Okla. Crim. App. 1985), and consequently the procedures enuncicated in **Laske** were not followed in this case. Further, I cannot say that the trial judge's statement that "I do find that [a prima facie case of conspiracy] has been made" is sufficient to meet the foundational requirements of 12 O.S. 1981, § 2801(4)(b)(5), and the procedures enunciated in **Laske**. A close review of the statements made by the prosecutors during first stage closing argument reveals that they improperly requested sympathy for the victim, engaged in derogatory name calling of the appellant, and improperly attacked defense counsel.

With regard to second stage closing argument, the majority concedes at page twelve (12) that "the prosecutors came very close to causing an abortion of an otherwise fair trial with their insistence in ignoring the standards for what is proper closing argument." I believe that the actions and comments of Prosecutors Larry Baresel and Tony Burns during second stage closing argument did not merely come close, but did deprive appellant of a fair trial during the second stage. Prosecutor Baresel dry fired the murder weapon, and commented that's "the last sound [Charles Keene] hears." Such comment was clearly improper, unprofessional, designed solely for its unfair prejudicial impact on the jury, and cannot be tolerated. **See Ford v. State**, 719 P.2d 457, 460 (Okla. Crim. App. 1986). **Cf. Brewer v. State**, 650 P.2d 54, 57 (Okla. Crim. App. 1982)(prosecutor's stabbing photograph of victim constituted misconduct). Prosecutor Burns requested sympathy for the victim on several occasions, made comments relating to societal alarm, and stated that the appellant had "fabricate[d]...a defense...through his little brother."

In light of the foregoing, it appears that the appellant may have been sentenced to death while the jury was "under the influence of passion, prejudice, or any other arbitrary factor." 21 O.S. Supp. 1985, § 701.13(C)(1). As was so aptly stated by Judge Bussey in **Brewer v. State**, 650 P.2d 54, 57 (Okla. Crim. App. 1982):

> Unfortunately, the appellant's right to a fair trial was the victim of an overzealous prosecutor. The record is replete with error committed during both stages of the trial, which when considered in a cumulative fashion, necessitates that the conviction be reversed and remanded for a new trial.

Based on all of the foregoing, I dissent to the affirmance of the appellant's judgment and sentence.